Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BO WEI HUA

Petitioner

v.

UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are the fifth, sixth and fourteenth amendments violated by failing to set aside a defendant's conviction where defendant was precluded from presenting evidence of her defense?

PARTIES TO THE PROCEEDING

1. Bo Wei Hua
2. Zhihao Liu
2. United States of America

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JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was issued on November 30, 2006. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

FIFTH AMENDMENT: "No person shall be held to answer for a capital offense, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in an criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

SIXTH AMENDMENT: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

FOURTEENTH AMENDMENT, Section I: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Defendant Bo Wei Hua entered the United States on December 14, 2004. (6/15/05 Tr. 146). Defendant borrowed $10,000.00 from Mr. Ah Lee in California. (6/16/05 Tr. 34). On or about April 7, 2005, Mr. Ah Lee gave Defendant credit cards in an envelope at the airport to take to Washington, D.C. and advised Defendant that the cards belonged to his sister and that Defendant should use the cards to purchase items for the sister. (6/16/05 Tr. 34-39). Defendant while in Virginia went to Best Buy on April 8, 2005 and purchased some electronic equipment with the credit card given to her by Mr. Ah Lee.

At trial, Mr. Zhihao Liu and Jin Liu testified that they did not conspire with Bo Wei Hua. Defendant Hua testified in her own defense and Counsel for Defendant Hua sought to elicit testimony from Defendant Hua on her defense of duress and coercion. The Government moved orally and in written motion for the Court to preclude testimony regarding coercion and testimony. (6/15/05 Tr. 147-182; 6/16/05 Tr. 4-14). Attorney for the Defendant Hua proffered to the Court that the testimony of Defendant Hua would be that she borrowed $10,000.00 from Mr. Ah Lee to be repaid in three to four months. However, Mr. Ah Lee demanded his money and threatened physical harm to Defendant and her daughter. (6/15/05 Tr. 148-151; 159-163). The Court granted governments motion to preclude the duress and coercion testimony by Defendant Hua. (6/16/05 Tr. 14).

REASONS FOR GRANTING THE WRIT

(1) The Court should grant the writ to determine whether the 5th, 6th and 14th Amendments are violated by affirming conviction of a defendant when the defendant was precluded from presenting evidence of her defense which the jury could have relied on in entering a not guilty verdict.

The Court has previously recognized that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court. Rock v. Arkansas, 483 U.S. 44; 107 S. Ct. 2705 (1987).

Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. California v. Trombetta, 467 U.S. 479; 104 S. Ct. 2528 (1984).

Several disadvantages arise when a defendant's fundamental right to testify and present her defense is limited by a ruling that violates that fundamental right and deprives her right to exercise her constitutional privilege to speak in the unfettered exercise of her own will.

I. THE CONVICTION SHOULD BE SET ASIDE BECAUSE OF VIOLATION OF DEFENDANT'S RIGHT TO PRESENT EVIDENCE OF HER DEFENSE

The prejudice from limiting defendant's testimony relating to her defense of duress and coercion is great where the evidence is defendant's theory of the case and if credited by the jury could lead to a different outcome. The trial Court precluded the Defendant from presenting evidence of duress and/or coercion because "it does not present a basis under settled Virginia or settled Fourth Circuit law of duress or coercion. (6/15/05 Tr. 14; 06/15/05 Tr. 162-179; 6/16/05 Tr. 4-13). "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998); see also Crane v. Kentucky, 476 U.S. 683, 689-690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); Marshall v. Lonberger, 459 U.S. 422, 438, n. 6, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983); Chambers v. Mississippi, 410 U.S. 284, 302-303, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Spencer v. Texas, 385 U.S. 554, 564, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967). This latitude, however, has limits. "Whether rooted directly in the *Due Process Clause of the Fourteenth Amendment* or in the Compulsory Process or *Confrontation clauses of the Sixth Amendment*, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane, *supra*, 476 U.S. at 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); citations omitted). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Scheffer, *supra*, 523 U.S. at 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (quoting Rock v. Arkansas, 483 U.S. 44, 58, 56, 107 S. Ct. 2704 (1987).

Just as a state may not apply an arbitrary hearsay rule that abridges a defendant's right to present witnesses in his own defense, Chambers v. Mississippi, 410 U.S. 284, 302 (1973), a Court may not also exercise his discretion by applying a rule of evidence that permits a defendant to take the stand, but arbitrarily excludes material portions of her testimony regarding her defense.

Although the right to present relevant testimony cannot be without limitation, but he limitation to a defendant's right to testify may not be arbitrary or disproportionate to the purpose they are intended to serve. See Id. at 295. The ruling of the Court that precluded defendant's defense does not serve any interest in the case but instead disposes of defendant's defense and theory of the case and also the right to request a jury instruction regarding her theory of the case. Moreover, the ruling by the Court could not assure

Duress is an affirmative defense and presents a question of law as to whether the proffered evidence makes out the defense. See United States v. Sarno, 24 F.3d 618, 621 (4th Cir. 1994). In order to establish a claim of duress, the defendant must show that: (1) she acted under an immediate threat of serious bodily injury; (2) she had a well-grounded belief that the threat would be carried out; and (3) she had no reasonable opportunity to avoid violating the law and the threatened harm. See United States v. King, 879 F.2d 137, 138-39 (4th Cir. 1989). A defendant has the burden of establishing sufficient evidence of the defense to warrant its submission of the claim to the jury. See id. In this case, the Court precluded testimony of coercion and duress during Defendant Hua's testimony based on the proffer by Defendant's counsel. (6/15/05 Tr. 169- 182; 6/16/05 Tr. 7-14). Defendant was not allowed to testify as to how she was

coerced by Mr. Ah Lee to commit the crime charged in the indictment. The preclusion of the testimony and evidence was prejudicial to Defendant because she was unable to testify on the important element of willful participation in the alleged conspiracy.

The general principle is well established that a defendant is entitled to have a jury instruction on any defense which provides a legal defense to the charge against him and which has some foundation in evidence, even though the evidence may be weak, insufficient, inconsistent, or doubtful credibility. United States v. Sielaff, 615 F.2d 402, 403 (7th Cir. 1979), *cert denied*, 446 U.S. 940 (1980); United States v. Winn, 577 F.2d 86, 90 (9th Cir. 1978). It is also well settled in this Circuit that "upon proper request, a defendant is entitled to an instruction submitting to the jury any theory of defense for which there is evidentiary foundation." United States v. Dornhofer, 859 F.2d 1195, 1199 (4th Cir. 1988) *cert. denied*, 490 U.S. 1005 (1989). However, in this case, the Court precluded testimony on coercion and duress, which invariably precluded Defendant from requesting coercion/duress instruction.

Defendant Hua testified in her own defense that she was compelled to travel to Washington area with the credit cards by Mr. Ah Lee. (6/16/05 Tr. 34-37). Had the Court allowed Defendant Hua to testify to those facts supporting her coercion and duress defense, Defendant would not have been found guilty.

If Defendant Hua were allowed to testify on the issue of coercion and duress, she would have presented sufficient testimony to support each element of duress and coercion defense.

CONCLUSION

For the foregoing reasons, this Court must grant certiorari.

Respectfully submitted,
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By: _____

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 05-4947

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

BO WEI HUA,

Defendant - Appellant.

No. 05-5001

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ZHIHAO LIU,

Defendant - Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. T. S. Ellis, III, District Judge. (CR-05-193)

Submitted: October 11, 2006 Decided: November 30, 2006

Before WILKINSON, WILLIAMS, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

John O. Iweanoge, THE IWEANOGES FIRM, P.C., Washington, D.C.; Michael S. Nachmanoff, Acting Federal Public Defender, Geremy C. Kamens, Assistant Federal Public Defender, Frances H. Pratt,Research and

Writing Attorney, Alexandria, Virginia, for Appellants. Chuck Rosenberg, United States Attorney, Paul Ahern, Special Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Bo Wei Hua and Zhihao Liu appeal their jury convictions and resulting sentences for conspiring to commit access device fraud, in violation of 18 U.S.C. § 1029(b)(2) (2000). We affirm.

Liu contends the district court erroneously instructed the jury that concealment of the crime was part of the conspiracy.This court reviews a contested jury instruction for abuse of discretion. United States v. Park, 421 U.S. 658, 675 (1975). The judgment is not subject to reversal if, given the full context of the trial, "the charge was not misleading and contained an adequate statement of the law to guide the jury's determination." United States v. United Med. & Surgical Supply Corp., 989 F.2d 1390, 1406-07 (4th Cir. 1993) (quoting United States v. Park, 421 U.S. at 675). Because concealment of identity is central to the objective of using fraudulent credit cards, we conclude that the district court correctly instructed the jury that concealment was a central part of this conspiracy. See Grunewald v. United States, 353 U.S. 391, 399-402, 405 (1957); United States v. Rabinowitz, 56 F.3d 932, 934 (8th Cir. 1995).

Hua contends the evidence was insufficient to sustain her conviction. This court must affirm Hua's jury conviction if there is substantial evidence, when viewed in the light most favorable to the Government, to support the

jury's verdict. Glasser v. United States, 315 U.S. 60, 80 (1942). In determining whether the evidence is substantial, this court views the evidence in the light most favorable to the government and inquires whether there is evidence sufficient to support a finding of guilt beyond a reasonable doubt. United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996). In evaluating the sufficiency of the evidence, the court does not review witness credibility and assumes the jury resolved all contradictions of the evidence in the government's favor. United States v. Romer, 148 F.3d 359, 364 (4th Cir. 1998). The jury, not the reviewing court, weighs the credibility of the evidence and resolves any conflicts in the evidence presented, and if the evidence supports different reasonable interpretations, the jury decides which to believe. United States v. Murphy, 35 F.3d 143, 148 (4th Cir. 1994). Circumstantial as well as direct evidence is considered, and the government is given the benefit of all reasonable inferences from the facts proven to the facts sought to be established. United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982). After careful consideration of the record, we find the evidence sufficient to sustain Hua's conviction.

Finally, Hua asserts that the trial court abused its discretion by refusing to allow her to present evidence and instruct the jury on the defense of duress. "In order to establish duress the defendant must show that he acted under a reasonable fear of an imminent threat of bodily harm and that he had no reasonable choice but to commit the illegal act." United States v. King, 879 F.2d 137, 139 (4th Cir. 1989) (emphasis in original) (citations omitted). However, duress "is limited to very narrow circumstances." Id. at 138. Hua contends she was "compelled" to use fraudulent credit cards under threat of harm to her daughter. Even assuming Hua's testimony is credible, as the district court noted, any alleged threat of harm was not imminent. See, e.g., Buczek v. Continental Cas. Ins. Co., 378 F.3d 284, 291 (3d Cir.

2004) (employing dictionary definitions of "ready to take place; near at hand" and "likely to occur at any moment; impending")
(citations omitted); United States v. Tokash, 282 F.3d 962, 970 (7th Cir. 2002) (noting that "future" or "later" and "imminent" are opposites). Furthermore, Hua possessed the reasonable alternative of reporting the threat to local or federal authorities. Therefore, we hold that the district court did not err in refusing the duress instruction.

Accordingly, we affirm Hua's and Liu's convictions and
sentences. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED